Bf - No. 3 for pltff in error
2d Brief for Pltff in error
in reply to 2d Brief

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1859.

WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM PACKET COMPANY, plaintiffs in error, vs. FRED. E. SICKLES AND TRUEMAN COOK.	Nos. 180, 181.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR, IN REPLY TO SECOND BRIEF OF DEFENDANTS IN ERROR.

The English cases cited on the second brief of the defendants either do not affect the question arising in this cause, or do not at all shake the positions assumed for the plaintiffs in error. We will state each briefly:

Aslin v. *Parker*, 2 Burr, 665, was thus: a judgment by default was had in ejectment, and an action of trespass for *mesne profits* was brought in the name of the lessee, and it was held to be maintainable.

Doe v. *Wright*, 10 Ad. & Ellis, 763, was thus: In trespass for mesne profits, the defendant pleaded: 1st. Plaintiff not possessed; 2. *Liberum tenementum.* To which plaintiff replied, by way of estoppel, the recovery in ejectment; and on demurrer, the replication was held good. Now, this case is exactly in accordance with our position. For there was a suit to recover damages, not recovered or recoverable, in the ejectment, and the defendant sought to be put in issue *the title* established in the ejectment, and the possession obtained by the judgment; and as to *this new cause of action*, the plaintiff rightly replied, by way of estoppel, the proceedings in the action by which the title had been established between the same parties. In the action of ejectment the party in possession can only be admitted to defend, upon entering into a rule confessing the lease, entry, and ouster laid in the declaration, and putting the case upon title only. Therefore, the title was the *only* point, and that distinctly presented *by itself*, on the record, and the *only matter* in issue between the parties on the record. But it should be also remembered that the modern ejectment is the creature of the courts,

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modelled by them, and the action for mesne profits grows out of and is dependent upon the ejectment, and is for that which would have been recoverable in the ejectment, but for the formation of the action so as to exclude everything but the single point of title from consideration; and that this was the *sole* point in issue on not guilty pleaded, is not to be shown by parol evidence, but appears upon the record as distinctly as when in trespass the defendant pleads *liberum tenementum.*

Rex. v. *St. Pancras*, *Peake's N. P. C.*, 219, was this: a highway divided the parish of St. Pancras and that of Islington. In a prosecution against the inhabitants of St. Pancras for not repairing, it was contended for the crown that the parishes were bound each to repair at *filum medium viæ.* But the defendants, showing that on an indictment in the same court, the parish of Islington had been found liable to repair the *whole*, this was held by Lord Kenyon to be conclusive against the crown. It is not easy to see for what purpose in our case this is cited. In England, parishes are bound of common right to repair, and nothing but prescription can relieve a parish from the obligation; and two parishes cannot be bound to repair the same road. Yet it is important to the whole public that it be known which is bound. The prosecution against Islington was by the King, representing the nation, and when he established, *by a verdict and judgment* in that prosecution, that Islington was bound, that fact was established for all time and all persons, just as a verdict finding one guilty of murder establishes his guilt wheresoever it may come in question. As, if a man commit felony, and then enfeoff A of his land, and after is attainted of felony by *verdict*, the feoffee is estopped, to say he is not guilty. But, in this case, if the feoffor had been attainted by his *own confession*, the feoffee should not have been estopped. 10 Vin. Abr. Estoppel R., pl. 19, 20. See also Holmes v. Walsh, 7 T. R., 458, where several examples appear of the effect of a conviction by verdict, showing that the conviction may, in pleading, be alleged instead of the guilt of the party, and *Lawrence, J.*, said: "If there be a judgment against the husband for treason, not reversed for error, it is sufficient to deprive the wife of dower."

But if this view will not explain the case, what does it prove here? Does it prove that an estoppel can arise, or conclusive evidence be furnished by a verdict and judgment between OTHER PARTIES? Is it claimed that this is established by that case?

Young v. Raincock, 7 Com. B., 337. Action for breach of covenant. Upon the trial defendant insisted that the recital in a deed that R. was heir to H., was conclusive evidence of the fact. The court said it was not necessary to decide the question of estoppel, because the defendant had not relied on it in plead-

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ing, and that the deed having been given in evidence was not binding on the jury, who might find the truth of the fact.

Mograth v. Hardy, 6 Scott, 627; *Vought v. Winch and Bowman v. Rostrow*, are referred to as to the same effect.

It is not perceived how this case impairs our position. It supports it.

Struth v. Bovington, 5 Esp. 57, was an action for obstruction to a water course, and on the trial before Lord Ellenborough, the plaintiff offered, *inter alia*, the record of a verdict and judgment for him against the defendant had in 1784, for an injury to the same right. His lordship said this was not an estoppel, but he must tell the jury to consider it as conclusive. That this case is not truly reported is very evident. It was tried July 27, 1803, five months after his lordship had delivered his elaborate judgment in *Outram and Morewood*, to which the ruling attributed to him at *nisi prius* is in direct opposition, and particularly to Eveleyn v. Hayes, cited by him, expressly approved by him, and by the whole court of King's Bench, in which Lord Mansfield had, in a case precisely like Strutt and Bovington, held a record to be neither an estoppel nor conclusive on the trial, but to be given to the jury as evidence for their consideration.

Now it is morally impossible that Lord Ellenborough could, within five months after the solemn decision of the whole court, the judgment delivered by himself, have forgotten the principles laid down in that judgment, or, remembering them, have repudiated them at *nisi prius;* and that the counsel on the other side should have submitted in silence to so gross a wrong. The probability is, that the evidence from the record being strong—nineteen years having passed between the judgment and the trial before him—Lord Ellenborough said he should feel bound to advise the jury to give full effect to the record, which he had a right to do, as to advise them on any other matter of fact. But that he intended to say that *in law* the record was conclusive upon them, is simply impossible. But if this impossibility happened, his decision at *nisi prius* is worth nothing against the solemn judgment of the whole court in *Outram* v. *Morewood.*

The case of *Hitchen* v. *Campbell*, 2 Black. R., 827, was this: the plaintiff having an election to bring *trover* for goods or *assumpsit* for the price, brought trover; and, upon not guilty pleaded, the defendant had a verdict and judgment. The plaintiff then brought assumpsit for the money, and the defendant pleaded the judgment in the former suit in *bar*, and the plea was held good. This was the common case of two successive actions for the *very same cause of action*, and a judgment in one was of course a bar to the other—the bar depending not upon the form of the action, but upon the *identity of the cause* of action. This is like the

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case of distress for rent, where, on the plea of *no rent due*, a verdict passes for the defendant, and the plaintiff afterwards sues in assumpsit to recover the same rent; and accords with what was said by Lord Hardwicke, in Smith v. Gibson:

"There are several cases where a recovery in one action shall be a *bar* to another action of the same nature, but that is where the recovery is a *satisfaction for very thing* demanded by *the second action*. In an action of trover the plaintiff recovers *damages* for the *thing*, and it is as a sale of the *thing* to the defendant which vests the property in him, and therefore it is a bar to an action of trespass for the *same thing*. See Reports Tempore Hardwicke, p. 319.

As to the positions laid down by Ld. Ch. J. DeGrey, in giving the opinion of the judges on the questions put to them by the Lords in the Duchess of Kingdon's case, the counsel on the other side seem to have overlooked the subject-matter of that opinion, to wit, the effect of sentences pronounced by the spiritual courts upon the fact and validity of marriages, &c. Of these subjects the spiritual courts had sought to obtain exclusive cognizance, and thereby to exclude all inquiry respecting them in the King's courts of common law, but had failed in their attempts. And his Lordship there shows how the courts of law gave effect to those sentences as the decisions of a court of concurrent jurisdiction. The courts of law would not allow these sentences to be *pleaded*. The courts that gave them were foreign courts, not proceeding according to the course of the common law, were not courts of record, and not courts of *exclusive* jurisdiction over this class of questions; therefore, their *sentences*, not being *judgments*, could not be *pleaded*. Yet the questions were such as necessarily required, for the peace and welfare of society, that one express and definite sentence upon them should, in all civil controversies, have conclusive effect, like proceedings *in rem*, to the nature of which these proceedings have a strong resemblance. And therefore, to accomplish what the state of society demanded, the courts of law gave effect to these sentences as evidence. With this key to the points laid down by his Lordship, all is clear; without it, some confusion must arise in applying them to courts of record proceeding according to the course of the common law.

There are two questions which have been presented on the briefs in this case, which seem to be confounded by the counsel for the defendants, but which are distinct and different.

The first is as to the effect of a previous judgment on the merits, upon a subsequent suit for the *same thing*, the *same cause* of action; as for example, where the same debt or demand is the subject of each of the suits.

In *Vought* v. *Winch*, which was a second action for the same

cause of action passed upon in a former suit, it was held that such a former judgment could not have the effect of a bar in the second suit unless pleaded by way of estoppel. And this decision is undoubtedly the established law in England. See *Stafford v. Clark*, 9 Moore, 724; *Bagot v. Williams*, 3 B. & C., 235; 2 Bing., 377, S. C., *Plummer v. Woodburn*, 4 B. & C., 625.

It is obvious, however, that by pleading "by way of estoppel," Ld. Ch. J. Abbott meant only pleading in bar, and not in the form of a technical estoppel, like that in Outram v. Morewood. For the forms of such pleas are given by Mr. Chitty, at pages cited in our brief in No. 181, and the pleas are mere pleas *in bar*, concluding like a plea of release, &c., *si actio.*

It is also obvious, that when a judgment on the merits has passed *for* a particular *demand*, and a subsequent suit is brought on it, *that demand* is *extinguished* by the former judgment; and if *against* it, the plaintiff is *barred*; and if further litigation is attempted, it must be in the power of the party to put an end to it by the former judgment, else suits for the same debt might be repeated indefinitely. And to prevent this seems to have been the object of the Stat. 4, Henry 4, enacting that "after judgments given in the courts of our sovereign lord the king, as well in pleas real as in pleas personal, the parties and their heirs shall be *thereof* in peace until the judgment be undone by attaint or error."

In this class of cases there seems force in what has been held in several of our American courts, that where, as in the action of assumpsit, other bars may be given in evidence under the general issue, as release, &c., so also may this bar, arising from the judgment. And often this class of cases has been confounded with another and very different class, in which the technical estoppel applies, and where the matter alleged cannot be pleaded *in bar*, and cannot be given in evidence as *conclusive*, because the same subject matter or cause of action is not in question; and this class is—

Secondly, Where one brings a suit for a certain demand or cause of action which has *never before* been the subject of a suit—(but he has in a former suit sought to recover another demand—both demands growing out of *one* title or interest in the plaintiff)—What, in such case, is the effect of the former proceedings upon the second action? This is the question now before the court.

Now, the rule we take to be this:

If, in the former proceeding, the title of the party has been *directly* alleged, and *an issue taken upon it which involves no other matter*, or if any fact being part of that title has been thus *separated from all other matters*, and made the point of an issue,

the finding upon it may in such subsequent suit be relied on in pleading as a technical estoppel, and not otherwise. And that where in the former suit there has not been such separation of the title from all other matters, but the same has been *involved in a general issue with other matters*, whether this arise from the mode of pleading adopted by the parties, or required by the nature of the action, no finding thereon can either establish or disaffirm the title so as to estop either of the parties in a subsequent suit; and that if it cannot operate as an estoppel by pleading, neither can it have the effect of an estoppel when given in evidence to the jury.

This is the undoubted law in England; which is proved by the case of Outram v. Morewood, already cited, where Lord Ellenborough shows the true nature and office of an *estoppel* as distinguished from a *bar;* by the case of Evelyn v. Hayes, cited with approbation in Outram v. Morewood, and tried before Lord Mansfield, which is precisely in point; by Hooper v. Hooper, McCl. & Young, 509, where, in an action for obstructing a way, the record of a verdict and judgment for the plaintiff in a former action, had on the plea of not guilty, was given in evidence, and it was held not to be conclusive of the plaintiff's right so as to prevent the defendant from going into his case; by Miles v. Rose, 5 Taunt. 704; and by the case of *Carter* v. *James*, 13 M. & W. 137; *and there is no English case to the contrary.*

It is true that different views prevail in the several States of the Union—some holding the English doctrine, and some admitting, in aid of the record, parol evidence to show *on what points the case turned*, of the most dangerous and latitudinarian scope and tendency, upon the notion that *certainty* was to be obtained by evidence in its nature the most uncertain, and that there was no danger in allowing one trial upon a general issue to conclude a question of title.

Mr. Justice Grier, when delivering the opinion of this court, in the case of Richardson v. Boston, (19 How.,) takes notice of this contrariety of opinion in the several States; and we submit that the present is a fit occasion for this high tribunal to lay down a rule which may tend to introduce order and consistency into the decisions in the States, and at all events to establish the true rule in this District. Here the court is trammeled by no State decisions establishing a local law, to which respect must be paid, whether right or wrong.

And we submit that the English decisions are in every respect entitled to the highest authority. They show the rule of the English law from the earliest times—from the Year Books down—of that common law which was brought over by our ancestors and established here, which is still maintained in many of the

States in its original simplicity and directness, and which ought not to be subject to capricious variations by judges speculating how, in this age of progress, they can amend what they have no rightful authority to alter—what they are appointed to expound, and apply, and preserve, until the legislative power shall interpose to change it.

If this court should adopt the exposition of the law established in England, the rule is clear beyond controversy—that in a second action for a second injury to the same right or title, a verdict and judgment for a plaintiff on the plea of not guilty in a former suit, cannot be used as an estoppel in pleading, and cannot be conclusive of the right when given in evidence to the jury.

And does not this rule apply to and settle our case? Ours is an action of assumpsit. There is no English case in assumpsit to which the rule has been applied, because no case has happened in which it could have been applied. Before *Slade's case*, as Lord Loughborough has shown, this action was never brought to recover a *debt* under the name of *damages*, but only to recover *special* damages for a breach of promise, as, for example, to recover on account of a breach of a promise to deliver corn, *by which* the plaintiff was obliged to buy other corn at a higher price. See *Rudder* v. *Price*, 1 Hen. Bl., pages 550, and 551, n. (a.) Since the 29, Car. II., no such case could well arise, since all contracts not to be performed within a year were avoided by that statute, unless reduced to writing, and signed by the party to be charged therewith. Hence, cases resting upon mere verbal evidence, could not present such a question, and if the contract was in writing, there would be no occasion to call in the aid of the former proceedings. But no case on an assumpsit where this question could have arisen has been found, so far as we know, in any English reports. Nothing is said against the application of the rule to it, nor intimated; and the case now before the court is precisely within the principle on which the cases establishing the rule are founded.

We insist, then, that the judgment was not conclusive, but only evidence to be left to the jury, pursuasive, or perhaps, *prima facie*, but still not precluding the plaintiffs in error from going into their case and rebutting that evidence by other proof.

And, surely, if it throws the burden of proof on the defendant in the action, and is to be deemed conclusive unless disproved, weight enough for every fair and reasonable purpose is given to the record. To make it conclusive of the contract, which is the title or right of the plaintiff in successive actions for new damages during fourteen years—to give a defendant no opportunity

to correct a slip or oversight, or to have the benefit of evidence subsequently discovered, such as, that the witness by whose testimony the former verdict was obtained has been discovered to have been largely interested in the recovery, is, it seems to us, to shut out truth where authority does not compel, justice does not demand, and expediency does not warrant it.

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